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SUPREME COURT, U.S.

No. 81-5138

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT LEE SMITH,

PETITIONER,

- vs -

JAMES P. MITCHELL,

WARDEN,

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

No. ----------

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ROBERT LEE SMITH,

PETITIONER,

- vs -

JAMES P. MITCHELL

WARDEN,

==========

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NATURE OF THE CASE

Your Appellant, Robert Lee Smith, respectfully represents that he is aggrieved by a judgment of the Circuit Court of the CITY of Petersburg, Virginia, entered on January 18, 1980, which judgment convicted him of rape and imposed upon him a sentence of fifty years in the State Penitentiary, twenty-five of which were suspended on good behavior.

MATERIAL PROCEEDINGS IN LOWER COURT

On November 2, 1979, the Appellant was arraigned on a charge of rape, to which he entered a plea of not guilty. Trial by jury was waived. After presentation of evidence and arguments, the Court announced a verdict of guilty. A timely Motion to Strike the Evidence was overruled by the Court. Sentence was imposed on January 18, after consideration and arguments of a presentence report.

QUESTIONS PRESENTED

1. The Court erred in denying the defense Motion to Strike the Commonwealth's evidence at the conclusion of the case in chief.

Following the arraignment of the Appellant, Karen Michelle Kates was called as the Commonwealth's first witness. Kates testified that she was seventeen years old and that while she was walking to work on July 5, 1979, she was followed by a man for some distance. She further stated that the man finally forced her into the fairgrounds and raped her. The prosecutrix identified the Appellant as her Attacker. (T-8).

On cross-examination, Kates admitted that she first saw her attacker about ten minutes to seven and that the attack was over by five after seven, a total time of fifteen minutes. (T-17). She also testified that her attacker was on foot and walked away from her on the day in question. Kates testified that she was face to face with her attacker during the rape and that he was five foot seven inches tall. (T-19). The prosecutrix stated that her attacker had no facial hair. (T-20).

During redirect examination, Kates indicated that her attacker had on dark blue pants and a light blue shirt with the name ''Robert'' on the shirt. (T-22).

Detective Thomas A. Patrick, called for the Commonwealth, stated that he had interviewed Kates at the Police STation. He testified that the prosecutrix selected a picture of the Appellant as her attacker. (Commonwealth's Exhibit #1). Patrick also indicated that he had questioned the Appellant after advising him of his "Miranda Rights". (T-20), Commonwealth's Exhibit #2).

Patrick testified on cross-examination that he had viewed the Appellant on the day after the alledged attack, and that Smith had facial hair on that day. (T-30).

Officer Sergeant Steve A. Batts was called by the Commonwealth. He testified to seeing the Appellant the day before the alledged attack wearing a blue shirt with the name "Robert" on it. (T-34).
Thelma Louise Jones, called by the Commonwealth, testified that she saw the Appellant sleeping on her porch at 405 Porterville Street, around eight o'clock on July 5, 1979. She stated that Smith, after waking up, asked to change his clothes. Mrs. jones recalled that the Appellant was wearing light blue pants and a light blue shirt with the name "Robert" on it. Later Mrs. Jones turned the clothes over to the police. (~~T-38~~. (T-38).

Responding to a quesrion of cross-examination, Mrs. Jones stated that her house was five blocks from the fairgrounds and that it would take one over a half an hour to walk that distance. (T-41).

Officer W. P. Newsome, called for the Commonwealth, stated that he had picked up some clothes from Mrs. Thelma Jones and that she later gave the clothes to Officer Lauter. (T-43).

Joan Faunce, a forensic scientist was called next by the Commonwealth and established as an expert witness. She testified to examining the physical evidence, specifically the slacks, t-shirt, and panties, along with certain hair samples. Ms. Faunce stated that based upon her examination, that there were considerable overlapping characteristics and that she was unable to distinguish between the (hairs); she could not determine where they came from. (T-50). Ms. Faunce also testified that she did not test or identify any of the blood stains she found on some of the articles of clothing, nor did she examine any of the male clothing in question. (Commonwealth Exhibits #3,4 and 5).

On cross-examination, Ms. Faunce agreed that from her test, she could not eliminate any male, other than those who do not have spermatazoa from the population that she considered.(T-56),Faunce stated that her tests were inconclusive. (T-57).

Detective Thomas James Lauter, called for the Commonwealth, testified as to the chain of possession of the clothing from the time Mrs. Jones gave them to Detective Newsome. (T-63).

Karen Kates was then recalled by the Commonwealth. After examining the Appellant's clothing marked as Commonwealth Exhibit #6, she testified that she did not recognize the clothes. She also testified that her attacker had on dark blue pants and that the shirt with the name "Robert" on it was not the same. (T-65).

The Commonwealth rested and the Court overruled a Defense Motion to Strike. (T-66).

The Defense called Officer William Grimmer. Grimmer testified to taking the Prosecutrix's statement on the day of the assault. That statement indicated that the attacker was from five foot six to five foot ten inches tall and had no facial hair. Kates also told Grimmer that her attacker lived in the West Street area.(T-70).

Grimmer stated on cross-examination that Kates was upset when he took her statement and that her attacker was wearing a light blue

shirt with the name "Robert" on it. (T-71).

Leon J. Williams, called by the defense, testified that he had gone to a club with the Appellant on July 4, 1979. Later on July 5, 1979, Williams accompanied the Appellant and two females to a Ms. Pride's house. Williams stated that Smith left the house about fifteen minutes before he left at five after seven on the morning of July 5, 1979. Williams also stated that it would take fifteen to twenty minutes to walk from the Pride residence to the fairgrounds. (T-79).

The defense next called Granville Pugh, who stated that he saw theAppellant walking at the corner of Gressett and Porterville on July 5, 1979. Pugh testified that he saw Smith "right around after seven o'clock and that he talked with Smith for a short time." (T-82).

On cross-examination, Pugh testified that Smith left him and was sitting on Thelma's porch about ten minutes to eight when he left the area. (T-87).

Detective Thomas A. Patrick, called by the defense, identified the picture of Robert Lee Smith as the same one that was taken on the day on the arrest. (Defense Exhibit #1, T-89).

Robert Lee Smith, testifying in own behalf, stated that he had gone to the Elk's home on July 4, 1979, with Leon Williams. He remained with Leon until about ten minutes of seven on July 5, 1979. After leaving Williams, Smith walked to his Aunt's house on Porterville Street. (T-83).

Smith testified that he reached Porterville Street, a little after seven and saw Mr. Pugh standing on the corner. (T-94).

When shown Defense Exhibit Number one, Smith stated that it showed the facial hair that he had on July 5, 1979. He also denied shaving for the last two or three weeks and stated that he was six foot tall. (T-95).

The Appellant testified that from Ms. Pride's home to PortervilleStreet is about six blocks and that from the fairgrounds to Porterville Street the distance is approximately one and one half miles. (T-97).

On cross-examination, Smith admitted to wearing the clothes marked as Commonwealth's Exhibit Number Six. (T-98).

Detective Thomas A. Patrick, recalled by the Commonwealth, stated that the Appellant had made a statement to the effect that he had left the Pride residence at eight A. M. and had gone to Porter-

ville Street. (T-101). On re-cross examination, Patrick recalled that Smith had made his statement while he was in detention and Patrick could not remember if the Appellant was upset. (T-103).

At the conclusion of the case, a Defense Motion to Strike was renewed and overruled. (T-110).

Facts

As further evidence of this is the fact that a warrant was taken out for the "Petitioner" without positive in face to face confrontation. The photo-graph was of a much younger Petitioner, with shorter hair and hardly any chance for fairness. When the facts are compaired, a part from the overly-zealous police tactics an impartial observer sees;

(A). Ms. Kates furnishes without police inticement or influence,

(1). The assailant was a black male; (T-33).

(2). About 5'7" (or 5'6" to 5'10"/ five foot-eight inches); (T.19).

(3). Wearing dark blue pants; (T-21)(T-64-65).

(4). Wearing a light blue shirt, with the name "Robert" over the left pocket; (T-21)(T-64-65).

(5). With no facial hair, the victum was within inches of the man's face during the rape; (T-20).

(6). The victum first saw the man about 6:50, and last at about 7:05 on the morning of July 5th, 1979; (T-17).

(7). The assailant was standing on Augusta Ave. when first notice by the victum, and went out the other entrance of the Fair-ground near the Fire Station upon leaving the victum; (T-8-15).

(B). The Commonwealth's corroboration of this evidence was that;

(1). That Robert Lee Smith is a black male; (T-33).

(2). That Robert Lee Smith had on a pair of light blue pants; (T-38; 60; 64-65).

(3). That Robert Lee Smith had on a light blue shirt with the name "Robert" written over the right pocket; (T-38; 60; 64-65).

(4). That Robert Lee Smith had facial hair when arrested; (T-30: 95).

(5). That Robert Lee Smith is six foot tall; (T-95).

(6). That Robert Lee Smith left the Pride home at 6:50 A.M. and that a fast walker would take 15-20 minutes to get from the Pride residence to the Fairgrounds; (T-77; 79; 92;) and that

Smith arrived at his aunt's home "right after 7:00 A.M."; (T-82; 83; 93).

(7). That Robert Lee Smith was leaving the Pride home at 6:50 A.M. and was a good, fast-paced 15-20 minutes away from Augusta Ave. and headed in the opposite direction from the Fairgrounds; That the assailant when last seen by the victum at approximately 7:05 A.M. was heading out the Fire Station Entrance to the Fairgrounds in the opposite direction of Mrs. Thelma Jones'home; That from Mrs. Jones' home to the Fairgrounds is a 30 minute walk, but that from the Fairground to the Fire Station Entrance is another ½ mile or better. When such is figured from Mrs. Jones' home/the direction thereto;.

ARGUMENT

The Court erred in denying the defense Motion to Strike the Commonwealth's evidence at the conclusion of the case in chief.

A Motion to Strike the Evidence, made at the conclusion of the Commonwealth's case, is intended to challenge the sufficiency and not the admissibility of the evidence. Poole vs. Commonwealth, 211 Va. 258 (1970). Similarly, when the Motion is repeated at the conclusion of all evidence an indentical purpose is being sought.

The proper standard in Virginia for determining the sufficiency of evidence is one based upon an examination of the entire record. All those necessary circumstances which are proved must be consistent with guilt, inconsistent with innocence and excluded every reasonable hypothesis of innocence. Inge Vs. Commonwealth, 217 Va. 360 (1976).

It must be admitted that the charge of rape can be sustained under the sole and uncorroborated testimony of the prosecutrix. even though the prosecutrix be a child of tender years. Robinson Vs. Commonwealth, 197 Va. 754 (1956). Nevertheless, the trier of facts must find the evidence of the prosecutrix credible and the guilt of the accused must be believed beyond a reasonable doubt. Fogg Vs. Commonwealth, 208 Va. 541 (1968); Willis Vs. Commonwealth, 218 Va. 560 (1977). In the case before the Bar, the Commonwealth relies heavily upon the witness identification of the Appellant by the prosecutrix shortly after the alledged attack. Yet the unrealibility of such testimony is legend. As Justice Brennan wrote "The vagaries of eyewitness

with the instances of mistaken identification... United States Vs. Wade, 388 U.S. 218 (1967).

If one looks beyond the identification to the prosecutrix's statements, both the one contemporaneous with the attack and the one while under oath, the Commonwealth's case crumbles to dust. Kates repeatedly testified that her attacker was about five foot seven inches tall and had no facial hair, but the uncontradicted testimony and exhibits shows the Appellant to be six foot tall and clearly wearing significant facial hair on the day of the alledged assault.

The prosecutrix established the time of the attack as being from six fifty to five after seven A.M., and that her attacker walked away from her at the Fairgrounds. All other testimony, both the Commonwealth and the Defense, places the Appellant at great distance from the Fairgrounds at approximately the times just before and just after the alledged attack. Furthermore, the distances involved from the Fairgrounds to the defendant's location at different times are so great that a man could not have transversedthose distances without assistance.

Moreover, the Commonwealth's stupendous efforts to link the Appellant to the blue pants and shirt introduced as Commonwealth's Exhibit Number Six only increase the unbelivability of the Appellant's guilt. Thevery clothes that led to the original arrest and that are admittedly the same clothes worn by Smith are rejected totally by the prosecutrix on the witness stand as not being the clothes worn by her attacker.

Finally, it must be noted that there is no evidence clearly linking the Appellant to the attack from the chemist laboratory examination of the clothes or the hair samples.

Smith's explanation of the events on July 5, 1979, is entirely possible and consistent with the facts in the present case. Where there areinconsistencies in the evidence, and where the evidence can be read as equally supportive of both the Commonwealth's case and the Defense's case, the evidence does not rise to the standard of beyond a reasonable doubt and should be resolved in favor of the defendant.

In the present case, the Commonwealth's evidence merely raises grave suspicion, especially in light of the prosecutrix's testimony as to the facial hair of her attacker and rejection of the blue clothes. The presence of mere suspicion, however grave, is not sufficient to support a verdict of guilty. The evidence must not only be consistent

with guilt of the accused, but inconsistent with his innocence. Harlow Vs. Commonwealth, 204 Va. 385 (1963). This Court need not affirm a judgment where it is plainly wrong or without evidence to support it. Avent Vs. Commonwealth, 209 Va. 474 (1968).

Evidence, although wholly circumstantial, is sufficient to establish criminal agency if it proves beyond a reasonable doubt that motive, time, place, means, and conduct concur in pointing out the accused as the perpetrator of the crime. Citing; Patler Vs. Commonwealth, 211 Va. 448, 457 (1970).

Also in 1970, The Virginia Supreme Court Held;

"It is well settled in Virginia that to justify conviction of a crime, it is not sufficient to create a suspicion or probability of guilt, but the evidence must establish the guilt of an accused beyond a reasonable doubt. It must exclude every reasonable hypothesis except that of guilt. The guilt of a party is not to be inferred because the facts are consistent with his guilt, but they must be inconsistent with his innocence." Citing; Wooden Vs. Commonwealth, 117 Va. 930 (1915); Cox Vs. Commonwealth, 140 Va. 513 (1924); Jones VS. Commonwealth, 210 Va. 299 (1969); Corbett Vs. Commonwealth, 210 Va. 304, 306 (1969); Cameron Vs. Commonwealth, 211 Va. 108 (1970).

"Evidence, particularily identification testimony, raised only strong suspicion of guilt and did not exclude every reasonable hypothesis except that of guilt, ant was thus not sufficient to sustain conviction..." Cameron, Supra; Brown Vs. Commonwealth, 211 Va. 252 (1970).

And in Smith Vs. Commonwealth, 185 Va. 800, The Virginia Supreme Court Held;

"Nor, where a fact is equally susceptible of two interpretations, one of which is consistent with the interpretation of the accused, may the jury arbitrarily adopt that interpretation which incriminates him...." Dixon Vs. Commonwealth, 162 Va. 798; Triplett Vs. Commonwealth, 141 Va. 577; Spratley Vs. Commonwealth, 154 Va. 854;

And in Holland Vs. Commonwealth, 190 Va. 32; the principle of Sutherland Vs. Commonwealth, 171 Va. 485; Thomas Vs. Commonwealth, 187 Va. 265; were reiterated;

"The facts are, at least, equally as susceptible of an interpretation which is consistent with the innocence of the defendant as with his guilt." Holland, at 441, 55 S.E.2d. 437 (1949). Supra.

"In order for inference to amount to evidence they must be inferences based on facts that are proved and not inferences based on other inferences." Smith, Supar, 40 S.E.2d. 273, at 282.

(19.2-257 Va. Code Ann, (Note #3, Jackson, Supra,) The 6Th And 14Th, Amendments of the United States Constitution.).

CONCLUSION

Based on the foregoing arguments, it is respectfully submitted that the testimony of the prosecutrix is inconsistent, contradictory and untrustworthly. Lacking any additional evidence of rape by the Appellant, the Commonwealth's evidence did not rise above suspicion and the Court erred in denying his Motion to Strike.

Your Appellant, therefore, prays that a Writ for Appeal to the judgment herein complained of be allowed him, and that his conviction be set aside and a new trial granted him.

Respectfully Submitted,

/s/ Robert Lee Smith

DATED: 29, June 1981.

ROBERT LEE SMITH, PETITIONER
POST OFFICE, BOX, 27264 #114505
VA. ST. PEN. - Richmond, Va.
23261

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 81-8052

Robert Lee Smith,

Appellant,

v.

James P. Mitchell,

Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. D. Dortch Warriner, District Judge.

Submitted: February 28, 1981 Decided: April 27, 1981

Before MURNAGHAN, SPROUSE, and ERVIN, Circuit Judges.

(Robert Lee Smith, Appellant Pro Se. Robert H. Anderson, III, Assistant Attorney General, for the Appellee.)

PER CURIAM:

A review of the record and the district court's opinion discloses that an appeal from its order refusing habeas corpus relief pursuant to 28 U.S.C. § 2254 would be without merit. Because the dispositive issues recently have been decided authoritatively, we deny a certificate of probable cause to appeal, dispense with oral argument, and dismiss the appeal on the reasoning of the district court. Smith v. Mitchell, C/A No. 80-0665-R (E.D. Va., Jan. 22, 1981).

DISMISSED.

1

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday *the* 18th *day of* June, 1980.

Robert Lee Smith,

Appellant,

against Record No. 800576
Circuit Court No. F401-79

RECEIVED

Commonwealth of Virginia,

Appellee.

From the Circuit Court of the City of Petersburg

Finding no reversible error in the judgment complained of, the court refuses the petition for appeal filed in the above-styled case.

The said circuit court shall allow court-appointed counsel the fee set forth below and also his necessary direct out-of-pocket expenses. And it is ordered that the Commonwealth recover of the appellant the costs in this court and in the court below.

A Copy,

Teste:

Allen L. Lucy, Clerk

By: Richard A. Grimes
Deputy Clerk

Costs due the Commonwealth by appellant in Supreme Court of Virginia:

Attorney's fee $100.00 plus his costs and expenses
Filing fee 25.00

Teste:

Allen L. Lucy, Clerk

By: Richard A. Grimes
Deputy Clerk

FILED

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA AUG 27 1980

RICHMOND DIVISION

CLERK, U. S. DIST. COURT
RICHMOND, VA.

ROSELLE LEE SMITH

V.

JAMES P. MITCHELL

CIVIL ACTION
NO. 80-0665-R

O R D E R

In accordance with the accompanying memorandum, and upon consideration of the petitioner's application to proceed in forma pauperis, his proof of poverty and the petition annexed, it is ORDERED that:

1. The petition be filed in forma pauperis;

2. The respondent file his answer within 23 days of this date;

3. The respondent will treat this order as a request that the records of the state criminal trial and habeas corpus proceeding, if deemed pertinent and available, be forwarded to the Clerk's Office in Richmond, Virginia. Such records shall be returned to the proper repository upon conclusion of the federal proceedings.

4. The petitioner is reminded of Fed. R. Civ. P. 5, which requires that every pleading after the complaint and every written motion, notice, and similar paper be served on all parties which service shall be made by mailing it to the party's attorney.

5. The petitioner is hereby granted 20 days from receipt of a copy of the respondent's answer and other responsive pleadings within which to file opposing affidavits or other appropriate material, if he be so advised. Failure to so respond may result in the entry of judgment against the petitioner on the basis of the respondent's responsive pleading.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

FILED
AUG 27 1980
CLERK, U. S. DIST. COURT
RICHMOND, VA.

ROBERT LEE SMITH :

: CIVIL ACTION
: NO. 80-0055-R

V. :

:

:

JAMES P. MITCHELL :

M E M O R A N D U M

Robert Lee Smith, an inmate at the Virginia State Penitentiary, proceeding pro se and in forma pauperis, brings this habeas corpus action under 28 U.S.C. § 2254, seeking relief from a conviction of rape entered by the Circuit Court of the City of Petersburg on November 2, 1979.

The only ground for relief contained in the petition is the statement that "a man can not be in two places at the same time, in which at one place to the other, it would take 15 to 20 minutes." Standing by itself, this statement would be insufficient to raise a constitutional claim. However, attached to this petition is a copy of a petition for appeal filed in the Virginia Supreme Court in petitioner's behalf. The petition for appeal challenges the sufficiency of the evidence and alleges that there was some evidence suggesting that petitioner was somewhere other than at the scene of the crime at the time the rape was committed. The present petition for habeas corpus will be treated as raising a claim of insufficiency of the evidence.

An appropriate order shall issue.

United States Magistrate

Date: AUG 27 1980

Service shall be made upon the Attorney General of Virginia for respondent by mailing him a copy of the order with the petition attached. A copy of the order shall also be sent to the petitioner.

David G. Bow
United States Magistrate

Date: AUG 27 1980

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

ROBERT LEE SMITH :

: CIVIL ACTION
: NO. 80-0665-R

V. :

:

:

J. P. MITCHELL :

FILED
SEP 30 1980
CLERK, U. S. DIST. COURT
RICHMOND, VA.

O R D E R

The petitioner may, if he so desires, respond to respondent's Answer with any matter he wishes to offer in rebuttal within twenty (20) days of this date. Such material should be in the form of affidavits, that is, sworn or signed statements by persons having first-hand knowledge of the facts to which the statements refer. A statement signed under penalty of perjury need not be notarized to qualify as an affidavit. In addition to such material the petitioner may file a legal brief supporting his view of the case. Should petitioner fail to submit any such materials, the Court has the power to enter judgment against the petitioner on the basis of the response to the complaint.

Let the Clerk send a copy of this order to the petitioner and to counsel for respondent.

David G. Lom
United States Magistrate

Date: SEP 30 1980

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

ROBERT LEE SMITH,

Petitioner,

v. CIVIL ACTION NO. 80-0665-R

JAMES P. MITCHELL,

Respondent.

ANSWER

Now comes the respondent, by counsel, and for answer to the petition for a writ of habeas corpus says as follows:

1. The petitioner is being detained pursuant to a judgment of the Circuit Court of Petersburg of January 18, 1980, wherein the petitioner was convicted of rape and sentenced to fifty years in the state penitentiary with twenty-five years suspended, conditioned upon his good behavior.

2. Petitioner is attacking the validity of the aforementioned conviction and alleges that the evidence was insufficient to support said conviction.

3. Petitioner appealed his conviction to the Supreme Court of Virginia, which affirmed the judgment of the Circuit Court by an order dated June 18, 1980. (Record No. 800576). The same allegation presently made was similarly raised in this direct appeal. Petitioner has filed no previous petitions for writs of habeas corpus in any state or federal court. Respondent admits that in view of the Supreme Court of Virginia's denial of petitioner's direct appeal, which represents a decision on the merits, petitioner has therefore exhausted his available state court remedies in conformity with 28 U.S.C. § 2254. See Saunders v. Reynolds, 214 Va. 697, 204 S.E.2d 421 (1974).

4. With respect to petitioner's allegation, respondent says that the evidence was sufficient to support petitioner's conviction. In order to sustain such a claim on habeas

corpus, it must be determined that no rational trier of fact could find from the evidence adduced at trial proof of a defendant's guilt beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307 (1979). Respondent submits that the evidence presented in the circuit court against petitioner amply met the test enunciated in Jackson, supra. In Virginia, corroboration of a prosecutrix, even one of tender years, is not essential. The Supreme Court of Virginia has repeatedly held that if the testimony of a prosecutrix is credible, such testimony alone is sufficient to sustain a conviction of rape. See Robinson v. Commonwealth, 197 Va. 754, 91 S.E.2d 396 (1956); Poindexter v. Commonwealth, 213 Va. 212, 191 S.E.2d 200 (1972). In petitioner's trial, the prosecutrix, Karen Kates, testifed regarding the commission of the offense. She stated that while on her way to work at about 6:45 a.m. on July 5, 1979, in the City of Petersburg, she was accosted by a man whom she identified in court as the petitioner. (See Tr. 8, 10). The petitioner slapped her several times in the face, causing her nose at one point to begin bleeding and also causing her to fall down. Petitioner then forcibly dragged her into the Petersburg Fairgrounds, made her undress, pushed her to the ground, and then raped her. (Tr. 9-15). Petitioner then walked away from her at about 7:05 a.m. During the encounter, which lasted approximately fifteen minutes, the two were "face to face." (Tr. 19). All of these events occurred during daylight, and Kates could clearly see what was happening (Tr. 21). The prosecutrix further testified that her assailant had had on dark blue pants and a light blue shirt with the name "Robert" on its left side. She also stated that she was "positive" of her in-court identification of petitioner as her rapist. (Tr. 16). There was also testimony that on the day of the rape the prosecutrix while at police headquarters looked through more than one-hundred photographs and a mug book. Having viewed these photographs, she picked out a picture of the

petitioner as her assailant, saying "That's him." (Tr. 23-34).

Furthermore, other evidence was introduced against petitioner which tended both to corroborate the truth of the prosecutrix's account and also to circumstantially link him with the commission of the rape. A police officer testified that he had seen petitioner one day prior to the day of the rape and had seen him wearing a blue shirt with the name "Robert" above the left pocket. (Tr. 34-35). Thelma Jones, petitioner's aunt, testified that at approximately 8:00 a.m. she came upon petitioner, who was sitting on her porch. She described him as wearing a blue shirt with the name "Robert" upon it. Petitioner then changed his clothes after inquiring if he could do so. (Tr. 38). Mrs. Jones also stated that "as slow as I walk, and I'm not well, it would take me over half an hour to" go from her home to the Fairgrounds. (Tr. 41). Thus, Mrs. Jones' account in no way brought into question Kates' statement that she had last seen the rapist leaving the Fairgrounds at about 7:05 a.m. A forensic scientist testified that she had found evidence of seminal fluid and spermatozoa on the victim's clothes and also Negroid hairs as well as blood stains on Kates' t-shirt. (Tr. 47-57). Petitioner introduced no convincing testimony which would have led a reasonable trier of fact to conclude that he was in an area some distance from the Fairgrounds at the time of the rape. Granville Pugh stated that he had had a brief conversation with petitioner in the vicinity of Mrs. Jones's home but admitted on cross-examination that this occurred at about 7:50 a.m. (Tr. 86). Leon Williams testified that on the morning of the rape at about 5:00 or 5:30 a.m. he left the Elks Club with petitioner and two women and went to a friend's house where he stayed until approximately 7:00 or 7:05 a.m. (Tr. 77). Williams estimated that petitioner left about fifteen to twenty minutes before his own departure and that the Fairgrounds were a fifteen to twenty minute

walk from the friend's home. (Tr. 78, 79). Petitioner testified that he left the house at about 6:50 a.m. and then proceeded by himself until he arrived at his aunt's residence. He admitted that while there, he had changed his clothes. He also admitted that he had been drinking all day on July 4 and also that night, that he had been convicted of a prior felony and that he had been wearing the blue clothes as described by the prosecutrix. (Tr. 97-98). The Commonwealth introduced rebuttal evidence that petitioner in a statement made to police officers on the day after the rape stated that he had not left for his aunt's home until after 8:00 a.m. (Tr. 102). Thus, respondent submits that petitioner failed to introduce any credible evidence supporting his claim that he had been in another part of Petersburg at the time that the rape was committed. Accordingly, respondent would argue that a rational trier of fact could find that petitioner's guilt had been established beyond a reasonable doubt, as required under Jackson, supra. Accordingly, the allegation is without merit and should be dismissed.

5. Respondent denies each and every allegation in the petition not specifically admitted herein.

6. Respondent says that arrangements are being made to have forwarded to this Court the record of petitioner's state court trial.

WHEREFORE, respondent prays that the petition be denied and dismissed.

JAMES P. MITCHELL

By: _____
Counsel

Robert H. Anderson, III
Assistant Attorney General
900 Fidelity Building
630 East Main Street
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of September, 1980, a copy of the foregoing Answer was mailed to Robert Lee Smith, #114505, Virginia State Penitentiary, Post Office Box 27264, Richmond, Virginia 23261.

Counsel

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

FILED

JAN 22 1981

CLERK, U. S. DIST. COURT
RICHMOND, VA.

ROBERT LEE SMITH :

: CIVIL ACTION
: NO. 80-0665-R

V. :

:

:

J. P. MITCHELL :

MEMORANDUM

Robert Lee Smith, an inmate at the Virginia State Penitentiary, proceeding pro se and in forma pauperis, brings this habeas corpus action seeking relief from a conviction of rape, entered by the Circuit Court of the City of Petersburg on 2 November 1979. Petitioner's sole ground for relief is that the evidence was insufficient. Respondent has filed an answer admitting exhaustion.

The Court has carefully reviewed the transcript and concludes that, taking the evidence in a light most favorable to the prosecution, a rational trier of fact could have found guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (1979). The evidence is adequately summarized by the Commonwealth in its Answer, and it is not necessary to summarize it again here. See Answer, pp. 2-4.

The petition must be denied.

An appropriate order shall issue.

Should the petitioner desire to appeal, written notice of appeal must be filed with the Clerk of the Court within 30 days of the date of this order.

Let the Clerk send a copy of this order and memorandum to petitioner and to the Attorney General of Virginia.

D. Dortch Warriner
United States District Judge

Date: 21 January 1981

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

FILED
JAN 22 1981
CLERK, U. S. DIST. COURT
RICHMOND, VA.

ROBERT LEE SMITH :

:

: CIVIL ACTION

V. : NO. 80-0665-R

:

:

J. P. MITCHELL :

JUDGMENT

In accordance with the accompanying memorandum, it is ORDERED that the petition is hereby DENIED and JUDGMENT is entered for respondent.

D. Robert Merhige
United States District Judge

Date: 21 January 1981

CLERK'S OFFICE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
UNITED STATES COURTHOUSE
TENTH & MAIN STREETS
RICHMOND, VIRGINIA
23219

WILLIAM K. SLATE, II
CLERK

TELEPHONE
(804) 771-2213
FTS 915-2213

February 4, 1981

Mr. Robert Lee Smith, #114505
P. O. Box 27264
Richmond, VA 23219

Robert H. Anderson, III, Esq.
Asst. Attorney General
900 Fidelity Bldg.
830 E. Main St.
Richmond, VA 23219

Re: 81-8052, Robert Lee Smith v. James P. Mitchell (C/A 80-0665-R)

This office has received the record on appeal. You each have 21 days from the date of this letter to state why the district court's judgment should be reversed or upheld. A formal brief is not necessary; you need not cite any cases. An informal brief like the one enclosed will be adequate. You should file two copies of your informal brief with this Court, mail a copy to the opposing party, and keep one for your records.

If you do not file an informal brief, the Court will still consider the merits of the appeal. If you do file one, the Court will not limit its review only to those issues raised in it.

After 21 days, the record and any briefs will be sent to a panel of judges which may take the following action:

(1) Summarily dismiss the appeal, affirm, reverse, or vacate the judgment of the district court without appointment of counsel, full briefing, or oral argument; or

(2) Appoint counsel if a party is indigent, direct that formal briefs be submitted and dispose of the appeal upon the briefs or after oral argument.

If the district court appointed an attorney to represent the pro se litigant his obligation officially ended when the notice of appeal was filed. Of course, this does not prevent the lawyer from voluntarily helping him to write his brief. The Court, in fact, encourages such help because it promotes clear arguments.

The average appeal takes at least six months to consider and decide. It is thus unnecessary to ask about the status of the case until at least this much time has passed. When the Court decides the case, it will promptly notify each of you. Responding to status inquiries occupies the attention of court personnel and prevents them from expediting your appeal and those of others. You should, however, notify the Court of any address change.

All correspondence concerning this case should be marked with the appeal number. This will greatly expedite the response to your mail. Future correspondence should be directed to the Staff Legal Section at the address shown on the letterhead.

CLERK

CLERK'S OFFICE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
UNITED STATES COURTHOUSE
TENTH & MAIN STREETS
RICHMOND, VIRGINIA
23219

WILLIAM K. SLATE, II
CLERK

TELEPHONE
(804) 771-2213
FTS 925-2213

February 4, 1981

Mr. Robert Lee Smith, #114505
P. O. Box 27264
Richmond, VA 23219

Robert H. Anderson, III, Esq.
Asst. Attorney General
900 Fidelity Bldg.
830 E. Main St.
Richmond, VA 23219

Re: 81-8052, Robert Lee Smith v. James P. Mitchell (C/A 80-0665-R)

INFORMAL BRIEF

Directions: Answer the following questions about the appeal to the best of your ability. Use additional sheets of paper if they are necessary. You need not limit your brief solely to this form but you should be certain that whatever you file answers the questions below. In either case, the Court prefers short and direct statements. You should return your original brief and one copy to the above address within 21 days of the date noted above and mail another copy to the opposing party..

(1) Did the district court fail to consider important grounds for relief? If so, what grounds?

(2) Did the district court incorrectly decide the facts? If so, what facts?

(3) Do you think the district court applied the wrong law? If so, what law do you want applied?

(4) Do you feel that there are any other reasons why the district court's judgment was wrong? If so, what?

(5) What action do you want the Court to take in this case?

(6) If you think the Court should hear oral argument in this case, why do you think so?

Signature
NOTARY NOT REQUIRED

4CCA 28
(Rev. 9/79)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

April 27, 1981

TO: Mr. Robert Lee Smith
Robert H. Anderson, III

NOTICE OF JUDGMENT

Judgment was entered in Case No. 81-8052 this date.

The Court's opinion is enclosed.

Petition for Rehearing (FRAP 40)

Filing Time A petition may be filed within 14 days after judgment. *No extension will be granted save for the most compelling reasons.* Requests based on grounds such as miscalculation of time or a need to consult with others will be peremptorily denied.

Purpose A petition should only be made to direct the Court's attention to one or more of the following situations:

1. A material fact or law overlooked in the decision.
2. A change in the law which occurred after the case was submitted and which was overlooked by the panel.
3. An apparent conflict with another decision of the Court which is not addressed in the opinion.

The filing of a petition in order merely to reargue the case is an abuse of the privilege.

Statement of Counsel *A petition shall contain an introduction stating that, in counsel's judgment, one or more of the situations exist as described in the above "Purpose Section". The points to be raised shall be succinctly listed in the statement. Lacking such a statement, the petition will be returned to counsel without filing.*

Form The 15 page limit allowed by the Rule shall be observed. The Court requires 15 copies of the petition; however, a pro se party who is indigent may file the original only.

Bill of Costs (FRAP 39)

Filing Time A party to whom costs are allowed, who desires taxation of costs, shall file a bill of costs within 14 days after judgment.

Mandate (FRAP 41)

Issuance Time The mandate is issued 21 days after judgment. A timely petition for rehearing will stay the issuance. If the petition is denied, the mandate will issue 7 days later. If a stay of mandate is sought, only the original of a motion need be filed.

WILLIAM K. SLATE, II
CLERK

Enclosure

COMMONWEALTH of VIRGINIA

Department of Corrections

TERRELL DON HUTTO
DIRECTOR

P. O. BOX 26963
RICHMOND, VIRGINIA 23261
804/257-1900

ADULT INSTITUTIONAL SERVICES

GUIDELINE TRANSMITTAL #1

June 12, 1981

MEMORANDUM

TO: All Guideline Recipients

FROM: R. M. Landon

SUBJECT: Guideline 806 - Good Conduct Allowance

Attached is the first issue of Guideline 806 for insertion in all Guideline manuals. Please note its effective date is July 1, 1981.

This guideline includes minor revisions from earlier draft versions that have been utilized for training Department staff of the content and implementation of the Good Conduct Allowance system. Please note these changes:

1. Sections VI.A and VI.B. (page 12) provide new language concerning the effect of Good Conduct Allowance and Good Conduct Time on parole eligibility dates.

2. Section VIII.I.4 (page 12) provides new language concerning the impact of offenses committed during incarceration which result in new felony or misdemeanor convictions.

3. Sections VIII. K.3.c. (page 15) and VIII. L.3.b. (page 16) have been expanded to include provision for an institutional operating procedure to permit knowledgeable staff to initiate review of an inmate's GCA class due to a marked improvement or decline in his/her institutional adjustment.

COMMONWEALTH OF VIRGINIA

VIRGINIA PENITENTIARY

INTER - STAFF COMMUNICATION

Date June 23, 1981

TO: Front Gate

FROM: Asst Supt For Treatment

SUBJECT: Temporary Authorization to enter Institution

NAME:+ See List

Organization being represented:

Self

PURPOSE OF VISIT

Volunteer Training

DATE AND TIME ENTERING INSTITUTION

Wednesday June 24, 1981 10 AM

STAFF CONTACT PERSON

Harriet Daivd Ex. 297

DESIGNATED AREA IN THE INSTITUTION

Chapel and ID Room B-Basement

EMPLOYEE MAKING REQUEST

Harriet David

EQUIPMENT LIST: ____ YES xxxxx NO

Rev. Norwood Carson
Mrs. Nannie Ross
Kwling Sam F Chow
Ed Hanzlik
Jerry Watt
Dr. Ray Huddenburg
Sussie Huddenburg
Bob Talley

cc: Second Gate
Back Office
Chief of Security
Watch Commander

A.W. Hollar
ASST SUPT FOR TREATMENT

Prison Civil War Round Table
Richmond, Virginia

ADDRESS ALL CORRESPONDENCE TO THE UNDERSIGNED c/o The SCHOOL, P O Box 27264, RICHMOND, VA 23261

June 15,1981

Mr. Robert L. Seward
Program Director,PCWRT
P.O. Box 27264
Richmond, Va.23261

Mr. Sylvester Putnam, Director
Richmond National Battlefield Park HQ
3215 E. Broad St.
Richmond, Va. 23223

Dear Mr. Putnam,

First of all, let me take this opportunity to thank you and Mr. Shute for such two (2) excellent enlightening films and the conversations afterward that you both presented to the group last Thursday evening.

Secondly, thanks equally for the materials (handout) and for mentioning us at Chattanooga.

Mr. Putnam, we are very much interesting in 'Living History', and while the program is in progress this summer we sincerely hope that you'll think about us and do a 'Living History' program for us. we prefer a Thursday in July or August if possible;instead of having the program in our regular meeting place we prefer one of our visiting room , and in that way you and the other guests don't have to come across the yard.

Mr. Putnam,on July 18,1981 P.C.W.R.T. is having its Annual Installation Banquet and you and Mr. Shute are invited and it is perfectly alright for each of you to bring a guest also.

Looking to hearing something from you real soon.

Again,thanks for last Thursday evening, I remain

ms. D. —
Your Advice on This ?

Sincerely,

Robert L. Seward
Robert L. Seward
Prog. Director,PCWRT

Ms. David

Prison Civil War Round Table
Richmond, Virginia

ADDRESS ALL CORRESPONDENCE TO THE UNDERSIGNED c/o The SCHOOL, P. O Box 27264, RICHMOND, VA 23261

June 15, 1981

Mr. Robert L. Seward
Director, PCWRT
P.O. Box 27264
Richmond, Va. 23261

Mr. Edward D.C. Campbell
Director
The Museum of the Confederacy
1201 E. Clay St.
Richmond, Va. 23219

Dear Dr. Campbell,

I called your office Friday (6-12-81) to check and see were you still planning on presenting a program before this group on June 25,1981, and according to the person I talked with from your office it was revealed that we are still on your calendar for June 25,1981.

The group is really excited about your visit, and certainly looking exceptional forward to the program you have in store for us. If you could be here around 1:45 P.M., we promise to have you out by 3:00 P.M. which allows you an hour and some odd minutes for your presentation.

Sir; please call us to let us know who is coming, what is being brought and what we need to provide. you can contact Mr. George Todd Jr. at 786-2101 (ext. 205) from 9:00 a.m. until 3:00 P.M. and give him the needed information.

We understand that your topic will be on Southern Culture ?

Thanks for all your help, I remain,

Sincerely,

Robert L. Seward
Prog. Director, PCWRT

Robert L. Seward

P.S. Please cut Pagurtas Book, Pamph, Pictures, etc for auction Slide Pagoda Slides